11-1700-5893-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Joseph Mitchell,

Complainant,

vs.

Northern States Power Company and International Brotherhood of Electrical Workers, Local No. 160,

Respondents.

ORDER DENYING MOTION FOR SEVERANCE

The above-captioned matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice of and Order for Hearing served on October 9, 1991, and the motion of the Complainant to sever the proceeding into separate cases involving NSP and the Union. The record with respect to the motion closed on March 21, 1994, upon receipt of the Complainant's final submission.

Calvin L. Scott, Attorney at Law, 1589 Woodbridge, Suite 202, St. Paul, Minnesota 55117, appeared on behalf of the Complainant. Cheri Brix, Attorney at Law, Northern States Power Company, 414 Nicollet Mall, Minneapolis, Minnesota 55401, appeared on behalf of Respondent Northern States Power Company. Maurice W. O'Brien, Attorney at Law, Gordon-Miller-O'Brien, 1208 Plymouth Building, 12 South Sixth Street, Minneapolis, Minnesota 55402-1529, appeared on behalf of Respondent International Brotherhood of Electrical Workers, Local No. 160 ("the Union").

Based upon all the files and records herein, and for the reasons set forth in the attached Memorandum, IT IS HEREBY ORDERED that the motion of the Complainant, Joseph Mitchell, for severance of the above-referenced cases is DENIED.

Dated this day of April, 1994

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

In March of 1991, the Complainant filed two charges of discrimination with the Minnesota Department of Human Rights in which he alleged that NSP and the Union had discriminated against him because of his race in violation of the Minnesota Human Rights Act. The Complainant's charge against NSP alleges, inter alia, that the Complainant was continually harassed and treated differently by his superiors, was not given the job duties and responsibilities that whites holding similar jobs were given, was unfairly disciplined, and was not allowed to continue working in his position as Material Handler-in-Charge following an on-the-job injury. In the Complainant's charge against the Union, he alleged that the Union had not represented, helped and supported him throughout his problems with NSP as it would have had he been a white member and that the Union had not addressed NSP's harassment, its attempts to reassign him, or his termination. Each charge was assigned a separate number by the Department of Human Rights.

After the charges were pending without resolution before the Department of Human Rights for more than 180 days, the Complainant requested a hearing before an Administrative Law Judge pursuant to Minn. Stat. 363.071, subd. 1a. By letter dated October 3, 1991, the Commissioner of Human Rights jointly referred the two charges to the Office of Administrative Hearings for a hearing. The Commissioner requested that the Office of Administrative Hearings "arrange to schedule a hearing as promptly as possible." (Emphasis added.)

On October 9, 1991, the Chief Administrative Law Judge issued a single Notice of And Order for Hearing with respect to the two charges. The matter was assigned one docket number by the Office of Administrative Hearings. Both Respondents were served and one hearing was scheduled for No vember 19, 1991. The hearing date was continued in order to allow for the completion of discovery. The matter proceeded through discovery and is now set for hearing beginning in late May. At a January 19, 1994, prehearing conference, the Complainant suggested that the case be tried as separate actions against the Union and NSP. The Respondents objected to bifurcation of the proceeding. On February 7, 1994, the Complainant filed a written motion for severance. Both Respondents have filed responses objecting to the motion for severance. The Complainant filed a reply brief with respect to the motion.

Minn. Rules pt. 6350 governs the consolidation of contested cases. The rule generally provides for the filing of petitions for consolidation by the parties as well as the filing of petitions for severance. Minn. Rules pt. 6350, subp. 3 and 7. The rule also permits the agency referring cases to the Office of Administrative Hearings for hearing to consolidate two or more cases for hearing and allows the Administrative Law Judge to

consolidate two or more cases on the Judge's own motion. Minn. Rules pt. 6350, subp. 2 and 6.

As a threshold matter, the Complainant argues that these charges were never properly consolidated. The Complainant contends in this regard that the Department of Human Rights "referred the cases separately with different and distinct numbers those being E22376-PUR1 for the company and E22376-LUR1 for the union" and that the Judge never issued an order to consolidate. Complainant's Motion at 1-2. The Administrative Law Judge finds that the two charges filed by the Complainant were consolidated for hearing by the Department by virtue of the Department's joint referral of the charges to the Office of Administrative Hearings and its request that "a hearing" be scheduled. The separate numbers referred to by the Department in its correspondence merely reflected the docket numbers originally assigned to the charges when they were initially filed with the Department. Accordingly, the Judge concludes that the cases were properly consolidated prior to the issuance of the Notice of and Order for Hearing, subject to a motion for severance as provided in subpart 7. Even assuming, arguendo, that the Department did not intend that the charges be consolidated when it referred them to the Office of Administrative Hearings, the charges in any event were consolidated by the Chief Administrative Law Judge sua sponte when the single Notice of and Order for Hearing was issued. It is within the authority of an Administrative Law Judge to consolidate actions pending before the Judge. Minn. Rules pt. 6350, subp. 6; accord Brosnahan v. Eckerd, 18 Fair Empl. Prac. Cases (BNA) 509 (D.D.C. 1976).

The Respondents have objected to the Complainant's motion for severance as untimely. Minn. Rules pt. 1400.6350, subp. 7 (1991), provides as follows:

> Petition for severance. Following receipt of a notice or order for consolidation, any party may petition for severance by serving it on all other parties and the agency, if the agency is not a party, and filing it with the judge at least seven business days prior to the first scheduled hearing date. If the judge finds that the consolidation will prejudice the petitioner, the judge shall order the severance or other relief which will prevent the prejudice from occurring.

As noted above, this matter has proceeded as a single matter for more than two years. The Complainant did not file a formal motion for severance until less than four months before the scheduled hearing. It thus is evident that the Complainant did not file a motion to sever seven business days prior to the first scheduled h earing date, which was November 19, 1991. The Complainant apparently contends that this requirement should not be strictly applied because he was never served with a notice or order for consolidation. While it would appear that the Notice and Order for Hearing issued by the Chief Administrative Law Judge on October 9, 1991, provided the notice contemplated by the rule, the Complainant correctly points out that a formal consolidation notice was not sent to the parties. In addition, the Complainant did suggest at an early stage in the proceedings

that severance might be appropriate to avoid undue delay. Under these circumstances, the Administrative Law Judge finds that the Complainant's motion should not be disregarded as untimely but should be considered on its merits.

Minn. Rules pt. 1400.6350, subp. 1, provides as follows:

> Subpart 1. Standards for consolidation. Whenever two or more separate contested cases present substantially the same issues of fact and law, that a holding in one case would affect the rights of parties in another case, that consolidating the cases for hearing would save time and costs, and that consolidation would not prejudice any party, the cases may be consolidated for hearing under this part.

Rule 42 of the Minnesota Rules of Civil Procedure contains similar language regarding consolidation and severance. Rule 42.01 provides that:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Rule 42.02 provides that:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of one or any number of claims, cross-claims, counter-claims, or third-party claims, or of any separate issues.

Rule 42 of the Federal Rules of Civil Procedure is identical to the state Rule.

The Minnesota courts have held that consolidation is permissive and rests within the discretion of the court. Shacter v. Richter, 271 Minn. 87, 135 N.W.2d 66, 69 (1965). In that proceeding, the trial court consolidated for trial two separate actions involving two distinct auto accidents and the same plaintiff. The allocation of the liability of the two drivers was at issue. The trial court granted the plaintiff's motion to consolidate in order to save trial time and expense for the court and counsel. On appeal, the Minnesota Supreme Court held that the mere fact that the parties are different and the actions stem from separate occurrences will not prevent consolidation when there is a common question of law or fact. 135 N.W.2d at 69. The Supreme Court determined that consolidation was supported by the existence of a fact question common to both actions.

In Anderson v. Connecticut Fire Insurance Co., 43 N.W.2d 807 (Minn. 1950), a plaintiff business owner sued four separate insurers based upon four separate property insurance policies. In a federal court suit, the plaintiff asserted that each action

against each insurer was separate and distinct. The plaintiff prevailed, and the matter was returned for trial in state district court. The plaintiff then requested consolidation of the four cases for trial. The trial court granted the motion based on the fact that the trials, not the actions, were being consolidated. The court held t hat consolidation did not create a loss of identity of the separate actions. The Minnesota Supreme Court affirmed, holding that the trial court has inherent discretionary power to consolidate four trials which involved the same issues and the same evidentiary facts. Id. at 816.

The Minnesota Supreme Court has set forth a balancing test to be used by the courts when addressing consolidation issues. In Bucko v. First Minnesota Savings Bank, 471 N.W.2d 95, 98 (Minn. 1991), the Court indicated that trial courts have broad discretion to consolidate separate lawsuits, but may not do so where convenience and judicial economy achieved by consolidation sacrifices a fair trial. In Bucko, three bank employees filed separate actions against their employer, the Bank, based on mandatory employee polygraph testing. Each employee presented distinct facts on the issue of damages. The Supreme Court found that the consolidation did not prejudice the Bank. In Fitzer v. Bloom, 253 N.W. 2d 395, 402 (Minn. Ct. App. 1977), the Minnesota Court of Appeals stated that, "[i]n each case, the trial court must balance convenience against the possibility of prejudice, however, it may order a severance of the actions for trial if undue confusion might result." Even though the plaintiff in Fitzer had asserted two causes of actions with different measures of damages, the Court of Appeals affirmed the consolidation of the cases for trial.

The central issue raised by the parties to the present contested case proceeding is whether or not the consolidation will prejudice the Complainant. The Complainant argues that he is prejudiced by the consolidation because the complaints are distinct and do not have common facts and issues. The Respondents contend that consolidation is appropriate because the two claims have common facts and assert that consolidation will save hearing time and expense and will not be prejudicial to the Complainant.

As stated above, analogous cases arising in Minnesota courts suggest that it is necessary to balance the issues of administrative economy and undue prejudice to a party in deciding whether it is proper in a particular instance to consolidate separate matters for hearing. In this proceeding, the Complainant has alleged, inter alia, that NSP discriminated against him in the terms and conditions of his employment as a Material Handler-in-Charge and in his reassignment and eventual discharge. The Complainant has also filed a charge against the Union, for failing to address NSP's harrasment of Petitioner, its efforts to reassign him, and his subsequent termination. The Petitioner alleges that the Union's failed to assist him based on race. In order for the Complainant to be successful with respect to either claim, he will have to establish that the Respondents treated him differently based upon his race. Both charges are based on the same underlying facts and involve common questions

of law and fact. In addition, consolidation will avoid unnecessary costs and delays for both parties and the court. See EEOC v. Great Western Bank, 52 Fair Empl. Prac. Cas. (BNA) 1892 (C.D. Cal. 1990).

In considering the appropriateness of consolidation of separate causes of actions, it is not necessary that the two actions have identical factual and legal issues. In a case involving a similar factual setting, the court held that it was proper to consolidate three sexual discrimination actions brought against an employer and a union. EEOC v. United Merchants and Manufacturers, 14 F.E.P. 289 (N.D.N.Y. 1975). CORRECT THIS CASE DESCRIPTION In that case, nineteen employees had filed charges of discrimination with the EEOC against the employer in which they alleged that a layoff and subsequent rehiring was discriminatory. They further charged that the union failed or refused to take action on their behalf based upon sex. The employees eventually filed two separate actions against the employer and the union. After investigation of the charges, the EEOC filed an enforcement action under Title VII of the Civil Rights Act of 1964 in which it alleged that the company had discriminated in its hiring, promotion, job assignemnt, and seniority practices in addition to the original layoff and rehiring, and filed an enforcement action under Title VII. The court held that the expanded issues were sufficiently related to the original charges and determined that the two separate actions brought by employees against the employer and union should be consolidated with the EEOC Title VII action because common questions of law and fact existed. Id. at 289.

Upon review of the administrative rule, the federal and state rules, and applicable case law, the Judge concludes that the two charges have sufficient similarity to justify their consolidation. The Complainant alleges that the cases are distinct and that consolidation will unduly prejudice him. As set forth in the case law cited above, consolidating trials does not merge the separate causes of actions. As long as there is a commonality of facts and legal issues, consolidation is appropriate. The decisions allow consolidation even where there are different legal issues on damages.

The Complainant's claim of prejudice is that the consolidation will create undue confusion. This matter is being tried before an Administrative Law Judge. The same issues will be heard by the ALJ, whether the trials on the two charges are consolidated or not. The federal courts have allowed consolidation of employment discrimination actions that are much more distinct and broader in scope than this proceeding. For example, in EEOC v. United Merchants and Manufacturers, discussed above, the court ruled that several causes of actions involving numerous distinct factual issues and a multitude of employment practices should be consolidated for trial. The court did not raise any concern regarding its ability to rule on the different claims or the parties' ability to effectively try the cases. The case at bar is much narrower in scope. The Administrative Law Judge does not believe that listening to witnesses testify during a single proceeding with respect to each of the claims will be unduly

confusing and is not persuaded that the Complainant will be prejudiced by the consolidation of these cases for hearing.

Another issue to be considered is judicial economy. Many of the underlying facts necessarily overlap. For example, the Complainant presumably will offer evidence that NSP discriminated against him in a particular fashion; he reported the discriminatory practice to the Union; and the Union failed to take remedial action. If the claims against NSP and the Union were to proceed separately, the Complainant would have to testify about the Company's discriminatory practice both in his action against NSP and again in his action against the Union, in order to lay the foundation for his complaint to the Union. This would inevitably result in lengthening the total trial time and increasing the costs of the Judge and the parties. While the Complainant correctly asserts that judicial economy is not a sufficient basis in itself to deny his severance motion, it is a factor that may be taken into account given the failure of the Complainant to demonstrate that he will be unduly prejudiced by the consolidation of the two claims.

Based upon the commonality of the underlying facts in this matter, the Judge finds that consolidation is appropriate. There has been no showing that consolidation will prejudice the Complainant. Accordingly, the Complainant's motion for severance is denied.

B.L.N.